No. 02-297

IN THE
Supreme Court of the United States

SHANNON T. DOYLE,
Petitioner,

v.

HYDRO NUCLEAR SERVICES,
Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONER FOR A WRIT OF *CERTIORARI*

Stephen M. Kohn
Counsel of Record
David K. Colapinto
Michael D. Kohn
Kohn, Kohn & Colapinto, P.C.
3233 P Street, N.W.
Washington, DC 20007
(202) 342-6980

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ARGUMENT

Petitioner Shannon Doyle hereby replies to the opposition to his petition for *certiorari* filed by the Solicitor General ("Solicitor") and Hydro Nuclear Services ("Hydro").

Neither the Solicitor nor Hydro seriously contested Mr. Doyle's argument that this case presents an exceedingly important question of federal law. Significantly, the Solicitor did not argue in support of the merits of the Third Circuit's ruling and did not contest the finding of the dissenting judge that the pre-employment waiver at issue in the case could "chill" the willingness of "all employees" to "report safety issues to the proper regulatory authorities." A23. The Solicitor also did not dispute the dissenting judge's conclusion that the waiver at issue in this case "fundamentally undermined" Congress' goal of "protecting potential whistleblowers." The Solicitor also did not dispute the opinion that Mr. Doyle suffered a "grave injustice" and upholding the Hydro waiver "dealt a blow to the safety of the nuclear industry."A23-24

In regard to the second ground for granting *certiorari*, both the Solicitor and Hydro engage in circular reasoning to mask a clear split between the Third Circuit's holding and other courts of appeal. The Solicitor's argument can be summarized as follows: Because the Third Circuit did not find the Hydro-waiver an improper release of substantive employment claims, the legality of the release does not merit this Court's review. Solicitor, p. 9. This argument is without any merit.

The fact that the Third Circuit attempted to mask the illegal nature of the Hydro release does not cure the defects in the lower court's decision. The lower court completely rejected the ruling of the Secretary of Labor which found the waiver to be improper. The panel also improperly attempted to explain-away uncontested facts in the record and legal concerns raised by the dissenting judge and the Secretary of Labor. The reasoning of the lower court conflicted with the strong line of cases prohibiting restrictions on employee protected activity as a condition of employment. These cases all barred such employer conduct, regardless of whether the employer had specific intent to ever enforce the pre-employment restrictions. *See, Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975); *Secretary of Labor, ex rel. Keene v. Mullins*, 888 F.2d 1448 (D.C. Cir. 1989).

Significantly, the Solicitor also ignored the conflict between prior decisions of this Court and the Third Circuit's holding. The Solicitor did not even attempt to explain how the Third Circuit's holding could be reconciled with the language in cases such as *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) and *Barrentine v. Arkansas-Best Freight*, 450 U.S. 728 (1981), each of which strongly held that pre-employment waivers of substantive rights, such as those waived in the Hydro release, violated federal law.

When the Third Circuit upheld the Hydro waiver and overturned the careful ruling of the Secretary of Labor, they created a split with other courts and administrative agencies. Prior to the Third Circuit's ruling, the Nuclear Regulatory Commission ("NRC") and the U.S. Department of Labor ("DOL") had both found the Hydro waiver to be illegal.

Other courts of appeal and this Court had rejected similar employer-efforts to force prospective employees to waive substantive rights as a condition of employment.

Certiorari is fully justified in this case. The lower court's ruling ignored (and give no deference to) the administrative determinations of the DOL (A29) and the NRC (A57) and it set a precedent which undermined "all employee's rights." A23.

I. THE PROSPECTIVE WAIVER LEGALIZED BELOW CREATES A DIVISION AMONG THE CIRCUITS.

The main argument against *certiorari* provided by both the Solicitor General and Hydro is premised on the purported "fact-bound" nature of the Third Circuit decision. According to the respondents, simply because the Third Circuit held that the waiver in question was "unambiguous" and did not interfere with employee protected activity, the analysis of the waiver should end there, and the legality of the Third Circuit's ruling should not be further reviewed.

This circular argument misses the entire issue. If the release unambiguously did not waive prospective rights, then respondents would be correct. But the issue here is how the Third Circuit erroneously ignored the factual findings and legal conclusions of the Secretary of Labor, and how these erroneous determinations created a conflict with prior authority.

The appropriate starting point to evaluate the *cert.* worthiness of this case is a careful review of the waiver Mr.

Doyle was required to sign. In relevant part, the waiver stated:

> Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above [which included any former employer of the employee] furnishing or receiving any information pertaining to me from any and all liability or claim as results (*sic*) of furnishing or receiving such information pursuant to this authorization.

A45.

If, upon reading that waiver, this Court were to agree that the release in question was "unambiguous" and could not be reasonably interpreted as "purporting to waive substantive employment claims, including blacklisting," than *certiorari* should be denied.

However, if this Court were to agree with the conclusion of the Secretary of Labor, the determination of the Nuclear Regulatory Commission (A57) or the "on its face" interpretation of the waiver provided by Judge Bright,[1/]

[1/] "On its face, Hydro's waiver can be read to release former employers as well as putative employers from liability. This is how Mr. Doyle, a lay person unrepresented by counsel, read the release during his pre-employment screening, and it is likely how a lay person in the same

(continued...)

it is absolutely clear that the waiver at issue in this petition did in fact purport to release substantive employment claims. Furthermore, as set forth in these various opinions, upholding Hydro-style waivers would cause a reasonable employee to be chilled in the exercise of Congressionally protected rights.

"On its face," the Hydro waiver "release(d) former employers as well as putative employers from liability" against claims filed by employees who had engaged in protected activity. A22. As such, the Third Circuit's decision also directly conflicts with prior decisions of this Court, which consistently found such pre-employment waivers to be improper. *See, Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 746 (1981) (Burger, C.J., dissenting) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974).

The Third Circuit's ruling also conflicts with the decisions of other circuit courts which have uniformly found waivers, which force employees to choose between a job and giving up an important substantive federal rights, to be illegal. For example, in *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975), the Eighth Circuit held that where the "immediate cause" or of an employee's discharge is the fact that the employee asserted his or her statutory rights, and refused to execute an improper waiver, the discharge was *per se* discriminatory. *Accord., Secretary of Labor, ex rel. Keene v. Mullins*, 888 F.2d 1448 (D.C. Cir.

1/(...continued)
situation would understand the release language." A23 (Bright dissenting).

1989) (an employment offer which required the employee to prospectively waive the substantive statutory protections was unlawful).

II. THE PROSPECTIVE WAIVER LEGALIZED BELOW PRESENTS EXCEEDINGLY IMPORTANT QUESTIONS.

The Solicitor and Hydro gave short-shrift to the alternative reason for granting *certiorari*: The decision of the Third Circuit raises extremely important questions of federal law which have far-reaching implications.

The critical impact of Hydro-style waivers will have on "all employees' rights" is well established in this case. A23. Initially, the waiver acted to undermine Mr. Doyle's ability to obtain employment with Hydro. It forced Mr. Doyle to inform Hydro of his prior whistleblowing activities and his concerns about executing the release. It also directly resulted in Hydro's refusal to hire Mr. Doyle and Hydro's report to other potential employers that Mr. Doyle had been "denied access" at a nuclear plant. Doyle's career in the nuclear industry was ruined and he suffered "devastating psychological, emotional and financial" damages. A25.

The Secretary of Labor recognized that Hydro-style waivers were generally "destructive"of employee rights. Such waivers undermined "Congressional intent" by making employees "afraid to speak out about safety problems." A34. The concerns of the labor department were also echoed by the Nuclear Regulatory Commission, which issued a Notice of Violation against Hydro on the sole basis of its waiver. A57.

Moreover, numerous *amici curie* have filed briefs or have requested leave to file briefs in support of Mr. Doyle's petition. These *amici* range from public interest organizations with years of experience representing whistleblowers, to organizations which represent tens of thousands of employees on health and safety issues, to leading nationally recognized whistleblowers. All of the *amici* recognize the practical impact Hydro-style waivers will have on employee rights and on Congress' goal of protecting public safety. They recognize that Hydro-style waivers will cause numerous other employees to suffer "grave injustices" similar to those suffered by Mr. Doyle.

Finally, Judge Bright, the dissenting judge on the Third Circuit panel, reviewed the record and recognized how Hydro-style waivers "fundamentally undermine(d)" "Congress' goal" of protecting whistleblowers. A23. Judge Bright readily understood how Hydro-style waivers not only "dealt a blow to the safety of the nuclear industry," but would also have a wide impact far beyond the nuclear industry. A24. Hydro-style waivers would violate "all employees' rights." "Anyone" signing such a release would be "left with the impression" that they waived their rights under all federal anti-retaliation laws, not just the Energy Reorganization Act.

Any whistleblower looking for a new job, who is confronted with a Hydro-style waiver, will be intimidated. Some, like Mr. Doyle, will object to the waiver and be fired. They will have no legal recourse. Others simply will be "chilled" and will decline to further seek employment with a corporation utilizing the Hydro-waiver. The willingness of most employees to engage in Congressionally encouraged

protected activity will be undermined. Who would engage in such activity if they understood that their employer could legally bad mouth them every time they attempted to find a new job?

Given the rise in employer utilization of pre-employment contracts, and the unquestionably destructive impact of Hydo-styled waivers, it is exceedingly important for this Court to grant *certiorari*.

III. AN "INDEPENDENT BASIS" DOES NOT EXIST FOR DENYING *CERTIORARI*.

Hydro and the Solicitor both assert that Mr. Doyle did not seek *certiorari* to challenge the alleged "legitimate non-discriminatory reason" given by Hydro "for refusing to hire" Mr. Doyle. Solicitor's Brief, p. 10. This argument is without merit. Moreover, an analysis of the reasoning behind the argument further explains how the Third Circuit's opinion caused a split within the lower courts.

Respondents' argument is predicated on the assumption that the Hydro waiver was proper. If the waiver was proper, Mr. Doyle's refusal to execute the waiver could constitute a legitimate non-discriminatory reason for Hydro's action. But it is the legality of the wavier which is at issue in this petition. If the waiver was not proper, then the so-called legitimate reason for the action would be called into question. Thus, the issue which merits *certiorari* is the legality of Hydro-style waivers.

As was explained in Mr. Doyle's petition, at page 19, other circuit courts which have evaluated improper waivers

similar to the Hydro wavier issued rulings identical to the Secretary of Labor's ruling in this case. Once the waiver was found to be illegal, the employee was protected in refusing to waive rights, regardless of the employer's subjective intent. *See*, *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975).

In this case, it is uncontested that Hydro "refused to hire" Mr. Doyle merely "because he refused to sign" the Hydro waiver. A35. The Secretary of Labor did not have to engage in a *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), analysis in order to determine the employer's motive. The reason for the adverse action was not disputed. It would have been a waste of resources for the Secretary to mechanistically apply the *McDonnell Douglas* factors when the reason for discharge was not at issue.

Other courts of appeal which have evaluated improper waivers have performed an analysis identical to the Secretary's analysis. In *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975), the court held that when the reason given for an adverse action was an employee's exercise of a protected right, further inquiry into employer motivation was not necessary . *Accord., E.E.O.C. v. Bd. of Governors*, 957 F.2d 424, 427-28 (7th Cir. 1992) (rejecting the application of *McDonnell Douglas* in a waiver case). Thus, every case in which a Court has found that a waiver and/or a condition of employment was illegal on its face - and an employee's reasonable objection to that wavier and/or condition of employment was the reason for the adverse action, there was simply no need to engage in a *McDonnell Douglas* type analysis.

Obviously, if the Hydro waiver were proper, and Mr. Doyle still refused to execute the waiver, Mr. Doyle could have alleged that Hydro used the failure to execute the waiver as a pretext for firing him. At that point a court would need to employ the *McDonnell Douglas* analysis in order to determine the actual motive of an employer. But that is not what occurred in this case. Hydro insisted upon Mr. Doyle executing a waiver at odds with this Court's prior holdings and refused to hire Mr. Doyle in violation the rule set forth in *Alexander*, *Barrentine*, *Brennan* and *Mullins*.

The issue presented in this petition is not whether an employee may be terminated for refusing to execute a proper waiver. As identified by Judge Bright, the issue presented here is whether employers can utilize Hydro-style waivers to "fundamentally undermine" Congress' intent to protect employees who "report safety issues to the proper regulatory authorities." A23.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Doyle's Petition for Writ of *Certiorari*.

Respectfully submitted,

Stephen M. Kohn
Counsel of Record
Kohn, Kohn & Colapinto, P.C.
3233 P Street, N.W.
Washington, DC 20007
(202) 342-6980